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In the Supreme Court of the United States

OCTOBER TERM, 1973

CASE NO. 73-800

JUDITH EVA HERSKOWITZ,
Petitioner,

vs.

BERNARD J. HERSKOWITZ,
Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Circuit Court of Dade County, Florida, entered a Final Judgment of Divorce on May 19, 1971. This decision is unreported and is set forth at page A. 1 in the Appendix to this response. A Motion for New Trial and Petition for Re-Hearing was filed and granted by Order of the Circuit Court dated September 7, 1971 (A. 8). On June 12, 1972, the Circuit Court entered its Final Judgment Upon Re-Hearing, unreported, and set forth at A. 9 in the Appendix to this Petition. The Petitioner then filed a Motion for Re-Hearing and an Amendment to Motion for Re-Hearing, both of which were denied by Order of the Circuit Court on October 27, 1972 (A. 19). On appeal to the District Court of Appeal of Florida, Third District, the aforesaid Final Judgments of Divorce were affirmed except for the *method of payment* of the Wife's share in the Husband's property. The Petitioner then filed a suggestion to "have question certified to the Supreme Court of Florida as one of great public interest", but the District Court declined to do so, and the mandate issued.

JURISDICTION

The Petitioner purports to invoke jurisdiction pursuant to the provisions of 28 U.S. Code 1257(3), and Rule 19 of the Rules of the Supreme Court of the United States. Respondent asserts the complete absence of jurisdiction in this Court in that no State court has decided any federal question, whether it be of substance or otherwise; nor has any federal issue, of substance or otherwise, even been presented to the courts below with the infinitesimal exceptions we now set forth.

This is a matrimonial matter. A brief marriage was terminated by separation in 1966; closely followed by seven years of litigation by the rejected Wife. In none of this litigation has the Petitioner raised any federal questions, except as will be noted:

(a) On May 19, 1971, the Circuit Court of Dade County, Florida, entered a Final Judgment of Divorce in favor of the Respondent; awarding $26,500 to the Wife by reason of her post-nuptial agreement pertaining to, and her accumulated equities in, the Husband's property. It also awarded a divorce and, among other odds and ends of alimony, child custody, and protective orders, stated at paragraph 8:

> The Court does hereby enter a Permanent Order of Protection as follows:
>
> [a] Plaintiff shall not annoy, molest, thereafter or assault Defendant.
>
> [b] Defendant shall not annoy, molest, thereafter or assault Plaintiff. She is not to follow him or have him followed. She is to refrain from making phone calls or going to his home or place of business, and she is not to make phone calls to any member of his family except in case of an emergency involving one of the children.
>
> [c] The parties shall not contact business or social acquaintances of each other, and they shall not interfere with letters to and from the children.

(b) On May 28, 1971, the Wife, being dissatisfied with her award, filed a "Motion for New Trial and Petition for Re-Hearing" (A. 5). The only mention of alleged deprivation of rights guaranteed by the United States Constitution is directed to the above-described Paragraph 8, and reads as follows:

> That the Court erred in its ruling under paragraph eight (8) of said judgment in that said paragraph, in particular sub-paragraphs (b) and (c) unquestionably violate the Defendant's *freedom of speech and movement* which is guaranteed by the Florida Constitution and the United States Constitution, and amendments pertaining thereto. (Rule 1.530)

(c) The Petition for Re-Hearing was granted on September 7, 1971 (A. 8), not for constitutional reasons, but to review claims of fraud relative to "special equitable and legal interests in the assets of the Plaintiff."

(d) On June 12, 1972, the Circuit Court entered Final Judgment Upon Re-Hearing. The Court made no ruling with regard to any constitutional issues. The Court did increase the Wife's award from $26,500 to $46,500, stating:

> All the financial matters between the parties and pertaining to their property interests, from the inception of the marriage to the date of this Judgment have been reviewed and this special equity award is a final determination. In reaching this determination the Court took into consideration not only the post-nuptial agreement between the

> parties, but also any special equitable interests the Wife may have in the assets of the Husband; moreover, the Court took into consideration all of the Defendant's claim of concealment and secreting of assets by the Plaintiff in the names of his father, Joseph Herskowitz, and his brother, Marvin Herskowitz. It is the intention of this Court to fully and finally lay at rest the litigation between these parties as pertains to their assets from the date of the inception of the marriage to and including the present time.

(e) On June 22, 1972, the Petitioner again moved for a re-hearing, and although the most recent judgment did not deal with the problem, the Petitioner again asserted a violation of the First Amendment as follows:

> The Court erred in its ruling under Paragraph Eight (8) of said Final Judgment in that said Paragraph, in particular, sub-paragraphs (b) and (c) unquestionably violate Defendant's freedom of speech and movement which is guaranteed by the Florida Constitution and United States Constitution, and amendments pertaining thereto. (Rule 1.530)

The Circuit Court entered its Order Denying Petition for Re-Hearing on October 27, 1972.

(f) Thereafter, the Petitioner filed her appeal to the District Court of Appeal of Florida, Third District, setting forth eight assignments of error, including twenty-two sub-assignments of error (A. 20). These alleged in voluminous detail the inadequacy of the Wife's awards

and numerous errors in the Court's handling of the trial. There is not a single assertion of error based upon deprivation of constitutionally guaranteed rights.

(g) In its Opinion of August 21, 1973, the District Court of Appeal of Florida, Third District, affirmed the Judgment below in all respects (except as to the manner in which the Husband was to make the annual payments of $46,500). The District Court of Appeal never mentioned the Constitution of the United States—nor any violation of rights guaranteed thereunder.

(h) On September 5, 1973, and pursuant to Florida Appellate Rule 4.6, the Petitioner asked the District Court of Appeal to certify the following non-Federal question to the Supreme Court of Florida as being of great public interest:

> In adjudicating the property rights of the parties in an action for dissolution of marriage, may the trial court bar one of the parties from enforcing the terms of a contract between the parties calling for joint ownership of all assets, and over objection make a consolidated "special equity" award which indistinguishably merges therein both special equities and contract rights? A. 33)

Petitioner gave four reasons why the District Court of Appeal should exercise its discretion, including the following:

> At issue also is the basic constitutional question of whether in a dissolution of marriage case, non-

enforcement of contract rights of a party constitutes a deprivation of property without due process of law, in violation of Article 1, Sec. 9 of the Florida Constitution 1968 Revision, and of the 14th Amendment to the United States Constitution. (Also see Art. 1, Sec. 10).

Also, inherently at issue is the question of whether the Court's merging of contract rights into special equities deprives a party of property without due process of law, since it changes the remedy and permits the Court to order installment payments of the special equity and thereby deprives a party of the valuable right to have a *judgment* which can be immediately executed. A. 34)

(i) The District Court of Appeal declined to certify the question as being of any importance. Its mandate issued.

* * *

This petition for Writ of Certiorari then followed.

The questions presented to the Supreme Court of the United States suggest that the Petitioner has been deprived of her property without due process of law in violation of the Fourteenth Amendment; and makes the further suggestion that the Florida courts failed to award full faith and credit "to New York laws" in violation of the United States Constitution.

These questions are unsubstantial in the extreme; nor have they ever been presented to any court in Florida for consideration or determination.

QUESTION PRESENTED

WHETHER VAGUE ALLEGATIONS OF CONSTITUTIONAL DEPRIVATIONS BY AN EX-WIFE, DISSATISFIED WITH HER AWARD IN A FINAL JUDGMENT OF DIVORCE, AND NEVER PREVIOUSLY PRESENTED TO THE STATE COURTS, FORM ANY BASIS FOR JURISDICTION IN THIS COURT TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE FACTS

We have read the Statement of the Facts and reasons for granting the writ as set forth in the Petition for Writ of Certiorari. It is, unfortunately, a mishmash of untruths, half-truths, and downright misrepresentations of the record below. (It is inconceivable, for example, that the record would support the claim that "extensive discovery was attempted, which indicated that the Husband's assets probably amounted to around $300,000".) Both parties are agreed, however, on the proposition that the Respondent-Husband became obliged to disgorge $46,500 in favor of his former Wife, a result reached after the Court "took into consideration not only the post-nuptial agreement between the parties, but also any special equitable interests the Wife may have in the assets of the Husband." (A. 15) On appeal, the District Court of Appeal of Florida, Third District, affirmed, because all alleged errors

> "are either procedural errors which were induced by the Appellant's own actions, or they relate to findings which are supported by the evidence

> before the trial judge, and are within the range of his judicial discretion. . . The Appellant has also urged reversal of the finding concerning the extent of the Appellant's interest in the Appellee's property. An examination of the lengthy record convinces us that the finding is based upon conflicting evidence and that we may not substitute our view for that of the trial judge." (A. 27)

Neither did the District Court of Appeal of Florida, Third District, mention the Constitution of the United States nor any claim of deprivation of rights guaranteed thereunder. No such claim of constitutional deprivation had been presented.

When the appellate court issued its mandate, it negated the suggestion for certification of question under Florida Appellate Rule 4.6. Thus the "constitutional issues" set forth in Paragraphs (c) and (d) of that suggestion *have never been timely brought to the attention of any of the Florida courts; nor have they been ruled upon by said courts.*

ARGUMENT

The decision below is eminently correct and even had substantial federal issues been raised below, or ruled upon, the results based (as the court below noted) on the preponderance of conflicting evidence do not suggest any need for review.

In constitutional terms, this is a simple matrimonial case. It does not involve issues of in personam service of

process, or full faith and credit of another state's decrees, or the reach of the long-arm statutes, or freedom of entry to the courts. Reduced to a nutshell, this Wife remains dissatisfied with her share of the marital trove. Seven years of litigation have failed to dampen her enthusiasm for justice, i.e., more money for herself. The first Judgment of Divorce netted her $26,500. She rejected it, and on re-hearing advanced her cause by an additional $20,000. She rejects this as well, but now, for the first time, she asserts that the distance between her yearnings and reality is actually a violation of due process of law. It is as if the Constitution guaranteed her fantasies, and the courts' failure to incorporate them into a decree violates the Fourteenth Amendment.

There are no discernible federal issues of substance, or at all, in the decision below. Neither the trial nor appellate courts ever mentioned any constitutional matter. No constitutional issue was ever raised, or argued by the parties to any court below (First[!] Amendment exceptions are noted above; as also the belated effort to raise a constitutional banner after the case was lost.)

This Court has no jurisdiction to grant a Petition for Writ of Certiorari unless substantial federal questions were previously raised or ruled upon below. The federal questions must be raised in the court below. *Hill v. California*, 401 US 797, 28 L.Ed.2d 484, 91 S.Ct. 1106; *Monks v. New Jersey*, 398 US 71, 26 L.Ed.2d 54, 90 S.Ct. 1563; *Street v. New York*, 394 US 576, 22 L.Ed.2d 572, 89 S.Ct. 1354; *Pickering v. Board of Education*, 391 US 563, 20 L.Ed.2d 811, 88 S.Ct. 1731; *Cardinale v. Louisiana*, 394 US 437, 22 L.Ed.2d 398, 89 S.Ct. 1162.

There are preciously few cases involving matrimonial matters that have ever been decided by the Supreme Court. (The Petitioner cited none). Such few cases as do appear decide federal questions that are only incidentally involved in matters of marriage and divorce — such as full faith and credit, service of process and jurisdiction in the courts. See *Boddie v. Connecticut*, 401 US 371, 28 L.Ed.2d 113, 91 S.Ct. 780; *May v. Anderson*, 345 US 528, 97 L.Ed. 1221, 73 S.Ct. 840; *Halvey v. Halvey*, 330 US 610, 91 L.Ed 1133, 67 S.Ct. 903; and *Williams v. North Carolina*, 317 US 287, 87 L.Ed. 279, 63 S.Ct. 207.

Here the courts below had jurisdiction over the parties and the subject matter. The only problem that exists is the visceral reaction of an angry woman to a delusion that the award of the courts below is inadequate. Should this ever become a basis for federal jurisdiction, the entire Bar will unanimously support Professor Freund's suggestion for a penultimate "Supreme" Court.

CONCLUSION

The decision should be affirmed; the Petition for Writ of Certiorari denied.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, TOBIAS SIMON, a member of the Bar of the Supreme Court of the United States, do hereby certify that a true and correct copy of this Brief for Respondent in Opposition was mailed this 14th day of December, 1973, to ROBERT M. BRAKE and DAVID BOLTON, Attorneys of Appellant, 1830 Ponce de Leon Boulevard, Coral Gables, Florida, 33134.

TOBIAS SIMON